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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN SEAN HENSHAW, Defendant and Appellant.	B167544 (Los Angeles County Super. Ct. No. BA 243630)
In re ALLEN SEAN HENSHAW on Habeas Corpus.	B174766 (Los Angeles County Super. Ct. No. BA 243630)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Reversed.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Allen Sean Henshaw is appealing his conviction for attempted second degree robbery. He contends the trial court erred in failing to instruct on unanimity regarding the act which constituted the attempted robbery, admitting testimony regarding an attempted robbery he had committed nine years earlier, and refusing to instruct on diminished capacity through voluntary intoxication.

We reverse based on the combined prejudice from two errors, lack of the unanimity instruction and failure to exclude the evidence of the prior crime. We do not reach the issue regarding intoxication instructions. We also do not address appellant's accompanying petition for writ of habeas corpus, in which he alleges that he was incompetent to stand trial.

PROCEDURAL HISTORY

Appellant was charged with committing the present offense, attempted second degree robbery, in 2003. The information also alleged that he personally used a knife during the offense and had one prior felony conviction, an attempted robbery in 1994.

The jury found appellant guilty of attempted second degree robbery but found the knife allegation not true. He admitted the prior felony conviction. The trial court sentenced him to 11 years in state prison, recommending that he be placed where he could be treated for substance abuse problems and his bipolar condition.

FACTS

1. Prosecution Testimony

As indicated, the jury found appellant guilty of attempted robbery, but found the knife allegation to be not true. It is impossible for us to know what part of the evidence the jury believed. We summarize the testimony of the five witnesses at the trial.

A. Brian Smith

At 9:30 or 10:00 a.m. on February 20, 2003, Smith walked out of his apartment building in Hollywood, holding a cup of coffee in his hand. He was walking to the bus stop to take a bus to work.

Smith noticed that appellant was "trying to climb up the wall" of the parking structure on the apartment building's first floor. He continued walking towards the

corner. Appellant approached him and said, "Hey, homey. Hey homey, let me talk to you for a second." Smith turned slightly towards appellant. Appellant said, "Give me all your money." According to Smith, but found untrue by the jury, appellant was pointing a brown-handled, Buck-style knife at Smith's chest.

Appellant's appearance was frightening. He was bare-chested and held his shirt in his hand. He had a lot of scars and tattoos, including a tattoo across his neck which said, "F--- you." His hair was in braids, and there was a bandana on his head. Silver showed in his upper front teeth. He seemed to be under the influence of alcohol, as his eyes were bloodshot or watery, he slurred his words, and he was off balance.

Smith told appellant that he did not have any money, and continued walking. Appellant followed closely behind him. He talked about needing money to go to the Indian reservation in South Dakota.

What the prosecutor referred to as a "second interaction" between Smith and appellant occurred, 25 feet, or 20 seconds, after the first. Appellant either tapped Smith on the shoulder or pushed Smith's shoulder to turn him around. He held the knife in the same position and said, "You know I can take all your money from you right now." Smith repeated that he had no money.

Appellant continued to follow Smith, who walked around the corner of Van Ness onto Hollywood Boulevard. As they walked, appellant talked about going to the Indian reservation, needing money, wanting beer, and being recently released from prison. He did all of the talking, and repeated the same things over and over.

When they got to Hollywood Boulevard, the street was fairly busy. Appellant and Smith stopped for the traffic light. A police officer in a patrol car was also stopped for the light. Smith did not flag down the officer because appellant grabbed his shoulder and gave him a threatening look. According to Smith, appellant was holding his hand over his front pocket, where the knife was, while they waited for the light.

Smith and appellant continued walking to the bus stop, which was about a block and a half from Smith's apartment. As they walked, appellant said that Smith's coffee cup was "nice," and he needed it for drinking beer.

The bus arrived as they reached the bus stop. Smith began to step onto the bus. Appellant tried to grab the coffee cup. Instead, he slapped it out of Smith's hand. Coffee spilled all over appellant, and the cup fell to the ground. Appellant "took a swing" at Smith, but missed. Smith got onto the bus and continued on his way, leaving appellant behind. Smith dialed "911" and reported the incident after he arrived at work. The tape of that call was played for the jury.

On cross-examination, Smith admitted that he had been convicted of forgery and passing a counterfeit check three years earlier, and had another conviction for passing a counterfeit check in 2001. He further testified that, although he had testified at the preliminary hearing that he had never seen appellant before, he recalled three weeks before the trial that he had once seen appellant three and a half years earlier. Appellant had been on Hollywood Boulevard with Smith's crime partner, Darrin, with whom Smith was no longer friendly. Smith had not spoken to either appellant or Darrin on that occasion.

On redirect examination, Smith testified that he was on parole and could be returned to prison if he made a false police report or lied in court.

B. Patricio Castillo

Castillo, the second prosecution witness, testified out of chronological order.

In May 1994, Castillo walked out of the building where he worked, in the company of a male coworker named Jorge Martinez and an unnamed female coworker. Appellant approached and threatened to hurt them if they did not give him money. He seemed intoxicated, was talking to himself, and looked "very disturbed." He had taken off his shirt, revealing scars on his body. Castillo's female friend said, "Don't pay attention to this guy, he is a little bit crazy." They gave him nothing, and continued walking. Appellant followed them. When they stopped for a light at the corner, appellant tried to hit Castillo, and started fighting with Martinez.

C. Officer George Collier

Officer Collier was the officer who was stopped for the light on Hollywood Boulevard. He notice appellant, who was shirtless, had his hair in braids, and wore a

bandana as a headband. Appellant was standing "very close" to a white male in a sports coat or sport shirt. *Collier saw nothing in either man's hands*. About two hours later, he heard a radio call describing appellant. He found him sitting on a bus bench, holding a can of beer in a paper bag.

D. Officer Brenda Nix

When Officer Nix arrested appellant, he did not have a knife, and appeared to be under the influence of alcohol. The statement which the officer took from Smith was similar to his trial testimony, except that Smith said that, while he was in his apartment, he saw appellant attempting to open a window. This was contrary to Smith's trial testimony, where he said he first noticed appellant as he exited the building.

2. Defense Testimony

Appellant testified that he was sitting on the stairs of Smith's building, drinking a beer and singing Indian songs, when he saw Smith. He approached Smith and walked with him because he "was starving for conversation." He told Smith about his life, the reservation, and prison politics. He did not demand money, and did not have a knife. He was a panhandler, and he may have requested spare change by asking Smith "if he had a little jingle to help an Indian out on a drink." He got into an argument with Smith near the bus stop because Smith was bragging about his experience in prison. When the bus came, appellant turned around and accidentally slapped Smith's hand one time. He continued drinking beer throughout the rest of the morning.

Appellant admitted that he had been convicted of a misdemeanor, making a false emergency report. He also admitted committing the attempted robbery in 1994. He denied the present crime, and thought Smith was lying because of their argument at the bus stop.

Appellant said he clearly remembered what happened with Smith. He had had a couple of beers, but was not drunk, at the time. Based on that testimony, the trial court refused to instruct the jury on diminished capacity through voluntary intoxication. Thus, appellant's defense was that no crime had occurred.

DISCUSSION

1. Unanimity Instruction

CALJIC No. 17.01 instructs the jurors that they must agree on the act which the defendant committed.[1] Appellant contends that, because Smith's testimony contained multiple acts which might constitute attempted robbery, and the prosecution did not elect a particular act, the trial court had a sua sponte duty to give CALJIC No. 17.01 here. We agree with him.

A. The Record

As the prosecution presented the case, there were two distinct points at which appellant demanded money. The first time was appellant's initial approach, where he pointed a knife at Smith's chest while saying, "Give me all your money." The "second interaction" was when appellant pushed or tapped Smith's shoulder, held the knife out, demanded money, and said, "You know I can take all your money from you right now." There also was a third point which provided a possible basis for attempted robbery, which was when appellant attempted to grab the coffee cup at the bus stop. Appellant testified that he never demanded money while using a knife, and accidentally hit Smith's hand when the bus arrived.

In his argument to the jury, the prosecutor went through Smith's description of the incident. He argued that appellant was guilty of attempted robbery at the point when he first walked up with the knife and demanded money. Everything which happened after that was unimportant, if the jurors all agreed on that event. Continuing with the rest of

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[1] CALJIC No. 17.01 states: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

Smith's testimony, the prosecutor later reminded the jurors that appellant slapped the coffee cup out of Smith's hand and swung at him. He then referred to the second possible act of attempted robbery, stating: "The defendant proceeds to harass him. Follows him. Walks up to him again with the knife at one point and says, ['']You know I can take your money, don't you? You know I can take your money.['] [¶] The defendant's guilty of an attempted robbery."

Defense counsel argued that Smith was lying, based on discrepancies in his story, his past record, and his belated recollection of having once seen appellant before in the company of his ex-crime partner.

B. Analysis

If applicable under the facts, the unanimity instruction, CALJIC No. 17.01, must be given sua sponte, unless the prosecution elects to rely upon only one act. Otherwise, the defendant may have been deprived of a unanimous jury verdict, because it is impossible to determine whether all of the jurors agreed that the defendant committed the same act. (*People v. Madden* (1981) 116 Cal.App.3d 212, 219; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 645.)

In *People v. Castaneda* (1997) 55 Cal.App.4th 1067, the trial court's failure to give CALJIC No. 17.01 sua sponte resulted in reversal of the defendant's conviction for possession of heroin. The defendant there was in a bedroom of his ex-wife's home when sheriff's deputies executed a search warrant there. A search of the bedroom disclosed tar heroin on a television set. More of the drug was found in the defendant's pocket when he was searched at the jail. The defense was that the heroin found in the bedroom belonged to the defendant's teenage son, and the heroin found at the jail was planted by the deputies. Reversal was required because the acts of possession were factually distinct and involved different defenses. Without CALJIC No. 17.01, it was possible that all 12 jurors agreed that the defendant possessed the heroin on the television, or the heroin in the defendant's pocket at the jail, or both, but there was no way of knowing that fact. (*Castaneda*, *supra*, at p. 1071.)

Similarly, in *People v. Crawford* (1982) 131 Cal.App.3d 591, 599-600, a conviction for possession of a firearm by an ex-felon was reversed due to the absence of CALJIC No. 17.01, where various handguns were located in different parts of the house, unique facts surrounded the possession of each weapon, and the jurors might not have agreed on the particular weapon the defendant possessed.

Another case reversing for such error was *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539, in which the prosecution presented evidence of two different terrorist threats on the same day, and the jurors might not have agreed unanimously on the act which constituted the crime.

The same problem existed here. The jury's verdict shows that at least some of the jurors thought Smith was lying, as the knife allegation was found untrue. Some of the jurors may have found appellant guilty of attempted robbery based on one of the two demands for money on the way to the bus stop, and others based on the attempt to grab the mug at the bus stop. We cannot say that they all agreed on the same conduct.

Respondent relies on the "continuance course of conduct" rule, under which CALJIC No. 17.01 need not be given where the offenses are closely connected in time, the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. (5 Witkin & Epstein, Cal. Criminal Law, *supra*, Criminal Trial, § 646; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required." (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.)

Examples of fact situations in which a unanimity instruction was not required include: *People v. Stankewitz*, *supra*, 51 Cal.3d at page 100 (defendant commandeered the victim's car and his confederate demanded money from the victim inside the car); *People v. Russo*, *supra*, 25 Cal.4th at pages 1134-1135 (no need for jurors to

unanimously agree on the precise overt act of a conspiracy, as there was only one agreement, and hence only one conspiracy); *People v. Maury* (2003) 30 Cal.4th 342, 422-423 (no possibility some jurors would have decided death was by strangulation, and others by a blow to the head with a rock); and *People v. Riel* (2000) 22 Cal.4th 1153, 1199 (no possibility that some jurors based guilt on robbing an employee at a truck stop, and others on making him hand over his wallet after he was forced to be a passenger in the defendant's car).

Here, in contrast, there were different facts and different defenses involved in the three possible acts of attempted robbery. There was a reasonable basis for the jury to distinguish between the acts, based on how the prosecution presented the case, and appellant's testimony that he did not demand money on the way to the bus stop, but accidentally hit Smith's hand when the bus arrived. This is therefore a case where a unanimity instruction was needed.

We postpone the question of prejudice, proceeding first to the issue regarding the 1994 attempted robbery.

2. Other Crimes Evidence

The witness Castillo's testimony concerning the attempted robbery in 1994 was introduced for the limited issue of intent pursuant to Evidence Code section 1101, subdivision (b) (section 1101(b)).[2]

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[2] Section 1101 states in pertinent part:

"(a) Except as provided in this section . . . , evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

All subsequent code references are to the Evidence Code unless otherwise stated.

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted (*Ewoldt*), superceded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.)

Appellant contends that the trial court abused its discretion by introducing evidence of the 1994 attempted robbery, because the evidence's probative value was outweighed by the risk of prejudice. We agree with him.

A. The Record

The admissibility of the 1994 case was discussed at a pretrial hearing. The judge had read copies of the police report and the preliminary hearing transcript which the prosecutor had provided. He asked for an offer of proof regarding the proposed testimony.

The prosecutor said he wanted to present testimony from one victim, Patricio Castillo, who might be able to bring in another witness, Dante Pomar. Jorge Martinez would not be testifying. Castillo would testify that appellant had approached three people, demanded money, and threatened to hurt them if they did not comply. That testimony would be used to show intent or general plan and scheme, because of the similarity with the present crime, in which appellant approached the victim on the street and demanded money while armed with a knife.

Defense counsel objected that the evidence should be excluded because it did not qualify under section 1101(b) and was more prejudicial than probative. She was concerned that the jurors would think, "He did it before, he did it again."

The judge ruled that testimony of the prior incident would be permitted, but that only one witness could testify, to avoid undue consumption of time and magnification of the event. He viewed the offenses as "strikingly similar," as both involved approaching

people in Hollywood, demanding money, and threatening to harm them. He also noted that, "at least in the probation report, the defendant is quoted as saying that he was panhandling and that there was no intent to steal or do harm to Mr. Smith, which I think raises an issue as to the defendant's intent, which, of course, is something the People must prove, in any event, regarding an attempted robbery." The judge believed the similarity between the past and present crimes helped establish that appellant intended to take money unlawfully, and was not simply asking for a donation when he approached Smith.

We have reviewed the probation report. It indicates that appellant told the police that he had been on Smith's street in an intoxicated condition. He "only recalled 'panhandling' in the area," and "denied having a knife and being involved in this case." As we read that language, appellant denied committing the offense, rather than denying that he had the intent to steal.[3]

The probation report also indicates that the probation officer could not interview Smith, as his telephone had been disconnected, and his name was not on the company directory at the location where he said he worked.

Prior to trial, appellant rejected the People's offer of three years in prison. He insisted on having a trial, on the ground that he was innocent, and Smith was lying.

Before Castillo testified, the jury was instructed to use his testimony only for the limited purpose of appellant's intent at the time of the crime.[4] He testified that in 1994,

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[3] It is possible the judge thought the reference to intoxication in the probation report meant that appellant might contest his mental state. However, appellant's subsequent testimony that he had only consumed two beers and clearly remembered his encounter with Smith led the judge to refuse the requested instructions on voluntary intoxication.

[4] "THE COURT: "Let me first caution the jury that this evidence is admitted for a limited purpose, and I will give you further instructions on that when I give you all of the instructions at the end of the case.

"The People are offering the testimony as to a limited issue regarding the defendant's intent at the time he engaged in -- he's alleged to have engaged in conduct that's charged in this case.

appellant approached Castillo and two coworkers; threatened to hit them if they did not give him money; followed them; and then suddenly swung at Castillo and attacked his companion.

The closing arguments of counsel focused on whether Smith was lying or telling the truth. Nobody mentioned intent or anything about appellant's mental state.

The court's final instructions included CALJIC Nos. 2.09 and 2.50, which told the jury to use evidence of the other crime only on the issue of intent, and not to show that appellant had a disposition to commit crimes.[5]

"Evidence of prior acts is not evidence of one's disposition or one's tendencies to do things. It is not to be received for that. It's simply as circumstantial evidence of the People's contention regarding the defendant's state of mind as to the facts of this case."

[5] "During the trial, certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. And you are not to consider this evidence for any purpose except the limited purpose for which it was admitted."

The jury was also told: "Evidence has been introduced for the purpose of showing that the defendant committed a crime, other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.

"It may be considered by you for the limited purpose of determining, if it tends to show the existence of the intent, which is a necessary element of the crime charged.

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all the other evidence in the case.

"Within the meaning of this preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed a crime, other than the one for which he is on trial.

"You must not consider this evidence for any purpose, unless you find, by a preponderance of the evidence, that the defendant committed the other crime. If you find the other crime was committed by a preponderance of the evidence, you're nevertheless cautioned and reminded that before the defendant can be found guilty of the crime

B. Analysis

"The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to proves those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379.)

To be relevant for identity, the uncharged crimes must be highly similar to the charged offenses. A lesser degree of similarity is necessary for the issue of common design or plan. The issue of intent requires the least degree of similarity. "For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant "'probably harbored the same intent in each instance.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 369-371, quoting *Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

"[E]vidence of uncharged misconduct '"is so prejudicial that its admission requires extremely careful analysis"' and to be admissible, such evidence '"must not contravene other policies limiting admission, such as those contained in Evidence Code section 352."' [Citation.] Thus, '[t]he probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.] On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

It is therefore clear that, even if other crimes evidence is admissible for one of the limited purposes of section 1101(b), it still must be evaluated under section 352, to determine whether its probative value is "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

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charged in this trial, attempted robbery, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime."

Numerous recent decisions of our Supreme Court have dealt with the question of the admissibility of other crimes which the defendant committed.

In *People v. Carpenter*, *supra*, 15 Cal.4th 312, the court upheld the admission of evidence that the defendant had committed similar rape/murders of hikers in another county, on the issues of intent, deliberation and premeditation. (*Id.* at pp. 378-380.) The defendant did not dispute the shootings, but sought to cast doubt on whether he had lain in wait for one victim and raped another. (*Id.* at p. 349.) Even so, his "not guilty plea put in issue all of the elements of the offenses, including intent." (*Id.* at p. 379.) The prior acts provided circumstantial evidence of the defendant's later intent based on """"the doctrine of chances,""" under which the recurrence of the unlawful act tended to negative the absence of an innocent mental state and establish the presence of criminal intent. (*Ibid.*)

In *People v. Kipp*, *supra*, 18 Cal.4th at pages 369-372, the defendant was charged with the attempted rape and strangulation murder of one 19-year-old woman. The trial court permitted evidence of the rape and strangulation murder of another woman the same age, three months earlier. The defense argued the uncharged crime was irrelevant on identity and intent because of dissimilarities between the killings. The Supreme Court ruled that the crimes had so many distinctive features in common that the uncharged crime could be used for identity, common design or plan, and intent.

In *People v. Lewis*, *supra*, 25 Cal.4th at pages 635-638, the current crime was the robbery and murder of a man in an apartment building. The prior crime was an assault and robbery of another man in the same building earlier that evening. That evidence was admitted on the limited issue of state of mind, based on the defendant's testimony that he entered the murder victim's apartment by mistake and with no intent to steal. In finding no error, the Supreme Court held that the two incidents were "sufficiently similar to support an inference that defendant harbored the same intent in both instances, that is, to forcibly obtain cash from the victim." (*Id*. at p. 637.)

In *People v. Steele* (2002) 27 Cal.4th 1230, 1243-1246, the defendant was charged with murdering a young woman in 1988 through multiple stab wounds and manual

strangulation. Evidence was introduced of a 1971 conviction for second degree murder, involving the strangulation and stabbing of a teenage girl. The defendant conceded intent to kill, but disputed premeditation and deliberation, due to his mental problems. *People v. Steele* held that, under *People v. Carpenter*, *supra*, 15 Cal.4th 312, the facts of intent to kill, premeditation and deliberation were material, because the defendant's "not guilty plea put in issue all of the elements of the offenses." (*People v. Steele*, *supra*, at p. 1243.) Even though the defendant had conceded intent to kill, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent. [Citation.] Moreover, the issues of premeditation and deliberation *were* disputed at trial . . . ." (*Id.* at pp. 1243-1244.)[6]

People v. Yeoman (2003) 31 Cal.4th 93, 121-122, involved the robbery and murder of a female motorist. The court held that evidence of a prior robbery and attempted kidnapping of another female motorist was properly admitted on intent, as the defendant contested whether he had formed the intent to rob the murder victim before he killed her, and the People were required to prove that intent in order to establish the robbery-murder special circumstance. (*Id.* at p. 121.)

We assume from the foregoing cases that the evidence of the 1994 attempted robbery was admissible under section 1101(b) to show appellant's intent, even though his defense was not based on intent, because his not guilty plea "put in issue all of the elements of the offenses." (*People v. Steele*, *supra*, 27 Cal.4th at p. 1243.) Even so, the evidence should have been excluded under section 352, because its probative value was outweighed by the risk of prejudice.

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[6] Justice Kennard dissented in *People v. Steele*, *supra*, 27 Cal.4th at pages 1281-1285, on the ground that evidence of the prior murder should have been excluded under section 352. In her opinion, evidence of the prior crime was highly prejudicial because it informed the jury that the defendant had been convicted of second degree murder, served time in prison, and then been released to kill again. She further thought that, since the prior murder was not premeditated, it had minimal probative value for showing that the present murder was premeditated.

"'Since "substantial prejudicial effect [is] inherent in [other crimes] evidence," uncharged offenses are admissible only if they have *substantial* probative value.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 318.) "In ruling upon the admissibility of evidence of uncharged acts . . . , it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*Id.* at p. 406.)

"Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2, italics omitted.)

Here, the act was not conceded. The issue was whether the act of attempted robbery occurred, and not the state of mind which accompanied the act.

In assessing probative value for the purpose of section 352, one factor our Supreme Court has considered is the importance to the case of the limited issue for which the other crimes evidence is introduced.

In *People v. Kipp*, *supra*, 18 Cal.4th at page 371, "the prosecution substantially relied upon evidence of the [uncharged] crimes to prove material and disputed factual issues."

In *People v. Steele*, *supra*, 27 Cal.4th at page 1246, evidence of the earlier murder was highly probative of a "critical" issue, the defendant's mental state, as he strongly disputed premeditation. The court stated: "The trial court should consider whether the party objecting to the evidence actually disputes the fact for which it is offered in weighing the probative value against its prejudicial effect. If the fact is undisputed, the evidence has less true probative value." (*Ibid*.)

Here, evidence of the nine-year-old similar crime had little true probative value on the issue of intent, because intent was not a disputed issue.

Probative value was also minimal because, in our view, the offenses were not "strikingly similar." One involved a knife and a single victim; the other involved no

weapon and multiple victims. Moreover, virtually every attempted robbery involves an approach, demand for money or property, and threat.

On the other hand, the evidence was highly prejudicial.

Substantial prejudice is inherent in evidence that a defendant has committed another similar crime. (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

An important factor the Supreme Court has looked to for prejudice is whether the facts of the other crime were "significantly more inflammatory" than the charged crime (*People v. Kipp*, *supra*, 18 Cal.4th at p. 372.) That was the situation here. Smith was not injured in any way in the charged crime. The prior incident involved a much greater level of violence, an unprovoked attack in which appellant suddenly struck Castillo's friend in the neck and started fighting with him.

Here, the evidence of the 1994 crime had little probative value, but the potential for great prejudice. It was therefore error under section 352 to admit it.

3. Combined Prejudice

There were two serious errors at appellant's trial, lack of a unanimity instruction and erroneous introduction of evidence of the 1994 attempted robbery.

The state harmless error standard of review of *People v. Watson* (1956) 46 Cal.2d 818, 836, generally applies to an erroneous section 352 ruling. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) There is a split of authority on the appropriate standard of review for failure to give a unanimity instruction. Some courts have used the *Watson* standard (see, e.g., *People v. Vargas* (2001) 91 Cal.App.4th 506, 562). Others have used the test for federal constitutional error of *Chapman v. California* (1967) 386 U.S. 18, 24 (see, e.g., *People v. Melhado*, *supra*, 60 Cal.App.4th 1529, 1536). We need not enter that controversy here, as even under the lesser *Watson* standard, the combined effect of the two errors substantially impaired appellant's constitutional right to a fair trial. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

The People's case was unusually weak. The sole witness to the robbery was Smith, who had recent convictions for forgery and passing bad checks. His version of the crime was based on a knife, which the jury found untrue. His testimony had many odd

aspects, including his failure to immediately report the crime to the bus driver, and the fact the officer who saw Smith and appellant at the traffic light did not see anything in either man's hands.

We cannot tell from the verdict whether the jurors agreed unanimously on what appellant did. We know that they partly disbelieved Smith. We also know that they gave some credence to appellant's testimony, as they asked during deliberations to rehear his direct examination.

Since there were significant reasons to question both Smith's and appellant's versions of the incident, there was an unusual risk that the jurors did not limit use of the prior crime solely to the issue of intent. They may well have decided that it was not clear what happened but, since appellant had done this type of crime before, he did it again. Jurors are presumed to follow jury instructions, but they are also human.

Unlike the prior decisions discussed in this opinion, this case contains a possibility that no crime occurred at all. The nature of the evidence and the errors compels the conclusion that appellant did not receive a fair trial. We therefore reverse the judgment.

DISPOSITION

The judgment is reversed. The petition for writ of habeas corpus is denied as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P.J. BOLAND, J.